(2)

No. 08-1418

In the Supreme Court of the United States

CAMILLE GROSDIDIER, ET AL., PETITIONERS

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The Civil Service Reform Act of 1978 (CSRA) is a comprehensive system that regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable * * *, including the availability of * * * judicial review." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).

The question presented is whether the CSRA precludes judicial review under generally applicable statutes of disputes concerning all employment-related matters, including those not defined as "prohibited personnel practices" or "adverse actions," unless such review is expressly authorized for federal employees by the CSRA itself or other federal statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 560 F.3d 495. The opinion of the district court (Pet. App. 8a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2009. The petition for a writ of certiorari was filed on May 14, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 3, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests

of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985). See *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get"); *Graham* v. *Ashcroft*, 358 F.3d 931, 933-936 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004).

The CSRA is an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983). It essentially creates a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the system provides as follows: (a) for "adverse actions"—*i.e.*, "major personnel actions specified in the statute"—the CSRA affords an explicit right of judicial review in the Federal Circuit "after extensive prior administrative proceedings," *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.); (b) for specified "prohibited personnel practices"—*i.e.*, "personnel actions infected by particularly heinous motivations or disregard of law"—the system provides administrative mechanisms to be followed by

judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (c) for remaining minor personnel matters involving bargaining-unit employees, the system provides a grievance procedure followed by binding arbitration and sharply limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, and 7123; and for such matters involving non-bargaining unit employees, the CSRA generally limits review to a separate internal agency grievance mechanism.

Prohibited personnel practices are governed by Chapter 23 of Title 5, which "establishes the principles of the merit system of employment." *Fausto*, 484 U.S. at 446. The chapter broadly defines "prohibited personnel practices" to include "personnel action" involving discrimination on the basis of race, color, religion, sex, national origin, handicap, or political affiliation; coercion of political activity; nepotism; retaliation against whistleblowers; and violation of any law, rule or regulation implementing or directly concerning the merit system principles set forth in 5 U.S.C. 2301. 5 U.S.C. 2301(b)(2), 2302(b)(1), (2), (7), (8) and (12). The chapter also requires that employees be "protected against arbitrary action" and "receive fair and equitable treatment in all aspects of personnel management," and prohibits the granting of "any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment * * * for the purpose of improving or injuring the prospects of any particular person for employment." 5 U.S.C. 2301(b)(2) and (8)(A), 2302(b)(6).

The CSRA's enforcement provisions for prohibited personnel practices, see 5 U.S.C. 1204, 1211-1218, 1221, 7701-7703, direct employees who wish to challenge such practices to file a complaint with the Office of Special

Counsel (OSC), 5 U.S.C. 1214(a)(1) and (3). If OSC finds reasonable grounds to believe an employee was or is to be subjected to a prohibited personnel practice, it may seek remedial action from the agency and the Merit Systems Protection Board (MSPB). 5 U.S.C. 1214(b)(2). An employee may seek judicial review in the Federal Circuit of any adverse decision of the MSPB in any case in which OSC has sought corrective action from the MSPB. 5 U.S.C. 1214(c)(1), 7703(b)(1). When OSC decides not to seek remedial action from the MSPB, the CSRA generally does not provide for review of that decision. *Ibid.* OSC must, however, provide the employee with its proposed findings of fact and legal conclusions, an opportunity to comment on them, and a final statement concerning the disposition of the complaint. 5 U.S.C. 1214(a)(1)(D) and (2). The CSRA expressly preserves any right or remedy available to an employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other anti-discrimination laws. 5 U.S.C. 2302(d).

2. Petitioners are United States citizens and employees of the Broadcasting Board of Governors (agency) who applied for promotions to various positions as international broadcasters. Although each petitioner was deemed qualified for the position being sought, in each instance the agency selected other individuals who were not citizens of the United States. The selected individuals were employed pursuant to 22 U.S.C. 1474(1), which authorizes the government to "employ, without regard to the civil service and classification laws, aliens within the United States and abroad for service in the United States relating to the * * * preparation and production of foreign language programs when suitably

qualified United States citizens are not available when job vacancies occur." *Ibid.*

3. In September 2006, petitioner Grosdidier filed suit against the United States in the Court of Federal Claims. Petitioner alleged that the agency had violated 22 U.S.C. 1474(1) by hiring non-citizens when "suitably qualified" citizens, such as herself, were available. Petitioner sought monetary relief under the Tucker Act, 28 U.S.C. 1491(a)(1), in the form of back pay under the Back Pay Act, 5 U.S.C. 5596. The court dismissed the action for lack of subject matter jurisdiction on the ground that Section 1474(1) did not mandate the payment of money damages. Pet. App. 10a, 18a-29a.

4. Petitioners subsequently filed the instant action, challenging the agency's promotion selections under the Administrative Procedure Act (APA) and seeking back pay. Petitioners again argued that the agency violated 22 U.S.C. 1474 by selecting non-citizens for positions for which petitioners were suitably qualified. Petitioners further sought to represent a class of United States citizens who claimed they had not been hired for other positions that were awarded to non-citizens because the agency allegedly interpreted its authority to hire non-citizens too broadly. Pet. App. 3a, 8a-12a.

The district court dismissed for lack of subject matter jurisdiction. The court found that petitioners' claim that the agency unlawfully denied them promotions by misapplying 22 U.S.C. 1474 alleged a prohibited personnel practice for which the CSRA provides the exclusive remedy. Pet. App. 15a-16a. The court reasoned that petitioners' claim that the agency acted arbitrarily and capriciously in violation of the statute by selecting non-citizens over equally qualified citizens alleged a prohibited personnel practice insofar as it implicates the merit

principles in 5 U.S.C. 2301(b)(8)(A) and (b)(2). Pet. App. 15a-16a. The court concluded that the allegations also amount to a prohibited personnel practice under 5 U.S.C. 2302(b)(6), which prohibits the granting of unlawful preferences in hiring. Pet. App. 15a-16a & n.5.

5. The court of appeals affirmed. Pet. 1a-7a. The court squarely rejected petitioners' contention that the CSRA "is not the exclusive avenue for covered federal employees to bring suits challenging personnel actions and that they may pursue their claim under the Administrative Procedure Act." *Id.* at 4a. Rather, the court held that the CSRA precludes judicial review of employment-related complaints unless such review is specifically authorized by the statute itself. See *id.* at 5a (citing *Fausto*, *supra*; *Filebark* v. *Department of Transp.*, 555 F.3d 1009, 1010 (D.C. Cir. 2009), petition for cert. pending, No. 08-1415 (filed May 14, 2009); *Fornaro*, 416 F.3d at 67; *Graham*, 58 F.3d at 933-936; and *Carducci*, 714 F.2d at 172). The court rejected petitioners' reliance on the Federal Circuit's decision in *Worthington* v. *United States*, 168 F.3d 24, 26-27 (1999), both because *Worthington* involved the Tucker Act rather than the APA, and, more importantly, because "*Worthington* * * * appears to be in significant tension with th[e] * * * precedents" of the D.C. Circuit. Pet. App. 6a.

Finally, the court rejected petitioners' reliance on 22 U.S.C. 1474(1), which allows the Voice of America to employ non-citizens "without regard to the civil service and classification laws." Section 1474, the court concluded, "has nothing to do with the question before us." Pet. App. 6a. That Section, the court found, merely "contemplates the hiring of non-citizens notwithstanding the usual prohibitions on such hiring, and without re-

gard to any limitations the civil service laws might place on that hiring." *Ibid.* "The statute does nothing to affect the exclusivity of the CSRA for suits targeting personnel decisions." *Id.* at 6a-7a.

DISCUSSION

Petitioners' sole contention is that the remedies provided in the CSRA are exclusive *only* as to employment matters that the CSRA defines as either a prohibited personnel practice or an adverse action. Petitioner correctly contends that the court of appeals' holding to the contrary—*i.e.*, that the CSRA precludes judicial review of all employment-related actions (unless such review is specifically permitted in the CSRA itself)—conflicts with the holdings of other courts of appeals. See Pet. 8-33; Pet. 14 ("The Federal Circuit has repeatedly construed the CSRA, and applied the decision in *Fausto*, only to preclude judicial review under other statutes of those personnel matters that *are* covered by the CSRA itself."). The issue petitioner asks the Court to review

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The court of appeals' determination that the CSRA precludes judicial review of all employment-related claims, including claims that are neither "prohibited personnel practices" nor "adverse actions" unless such review is specifically provided for federal employees in the CSRA or elsewhere, is consistent with decisions from the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. *E.g.*, *Tiltti* v. *Weise*, 155 F.3d 596, 600-601 (2d Cir. 1998); *Pinar* v. *Dole*, 747 F.2d 899, 912 913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Broadway* v. *Block*, 694 F.2d 979, 981-986 (5th Cir. 1982); *Ryon* v. *O'Neill*, 894 F.2d 199, 201-204 (6th Cir. 1990); *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984); *Weatherford* v. *Dole*, 763 F.2d 392, 393-394 (10th Cir. 1985). The decision conflicts, however, with the narrower rule applied in the Federal and First Circuits, which have held that the CSRA does not bar judicial review of an employment-related decision that is not governed by the CSRA provisions covering prohibited personnel practices and adverse actions. *E.g.*, *Worthington* v. *United States*, 168 F.3d 24, 26-27 (Fed.

is squarely presented in the petition for a writ of certiorari filed in *Filebark* v. *Department of Transportation*, No. 08-1415 (filed May 14, 2009). The United States is filing a brief in that case concurrently with the filing of this brief and agrees that a writ of certiorari should be granted in *Filebark*. Resolution of the issues presented in *Filebark* will control the issue regarding judicial review presented in this case as well. The Court should therefore hold the petition in this case pending the disposition of the petition in *Filebark* or, for the following reasons, deny the petition in this case.

The instant case does not appear to be an appropriate vehicle for resolution of whether the CSRA precludes judicial review of employment-related claims that are not defined by the CSRA as either prohibited personnel practices or adverse actions. The district court held (Pet. App. 14a-17a) that petitioners' claims allege prohibited personnel practices under the CSRA because they describe violations of merit principles. And, as the district court held, the CSRA *does* provide a remedy (including judicial review in some instances) for such claims. *Ibid.* Thus, even under petitioners' theory that the CSRA does not preclude judicial review of matters that are neither prohibited personnel practices nor adverse actions, see Pet. 14-25, the CSRA would preclude judicial review of petitioners' APA claims. The court of appeals did not rely on the district court's conclusion that plaintiffs' claims allege prohibited personnel prac-

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Cir. 1999); *Romero* v. *United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994); *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984); but see *Irizarry* v. *United States*, 427 F.3d 76, 78 n.2 (1st Cir. 2006) (noting, but not deciding, that *Dugan* may be inconsistent with this Court's later decision in *Fausto*).

tices under the CSRA, and petitioner does not challenge that conclusion before this Court.

Petitioners recognize the narrower reach of the district court's decision, but seek to take advantage of the "broader grounds," Pet. 7, inherent in the court of appeals' reliance on prior circuit holdings that "the CSRA is comprehensive and exclusive," Pet. App. 5a. Nevertheless, a ruling by the Court in petitioners' favor on the broad issue they present would not appear to permit the judicial review they seek. Accordingly, because this case does not cleanly present any issues that are not already the subject of the petition in *Filebark*, at this time review of the court of appeals' decision is not merited.

CONCLUSION

The petition for a writ of certiorari should be either held pending this Court's decision in *Filebark* v. *Department of Transportation*, No. 08-1415, and then disposed of accordingly, or denied.

Respectfully submitted.

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